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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MOE SIRY,

Plaintiff, Cross-defendant and
Appellant,

v.

LARRY RUBIN,

Defendant, Cross-complainant and
Respondent.

D054251

(Super. Ct. No. 37-2007-00067107-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

Moe Siry retained his friend Larry Rubin to perform work on Siry's home remodel project. After six months, Siry terminated Rubin's services. Siry then sued Rubin, asserting contract and tort claims, and statutory claims under the Contractors' State License Law (Bus. & Prof. Code, § 7000, et seq.).¹ The trial court, sitting without a jury, found Siry did not prove his claims, and entered judgment in Rubin's favor. On appeal,

¹ All further statutory references are to the Business and Professions Code unless otherwise noted.

Siry contends the court's findings are unsupported by the evidence. We reject this contention, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Under well established appellate rules, we view the evidence in the light most favorable to the judgment. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802, fn. 2; *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 849, fn. 1.)

Background Summary

Siry owns a home on about three acres of property in Rancho Santa Fe. He worked as a licensed general contractor for about 19 years, from 1984 through about 2003. In about 2004, Siry retained an architect to prepare plans for an extensive remodel of his home, which involved taking down the existing house, and constructing a new residence, barn, and cabana. In late 2004, Siry obtained permits for the project as an owner-builder. The construction was scheduled to begin in 2006.

Siry was close friends with Rubin, who had worked in the construction industry for about 15 years, but was not a licensed contractor. In early 2006, Siry retained Rubin to provide framing work for the remodel project. Siry orally agreed to pay Rubin \$55,000 for the work, in weekly installments of about \$4,000 or \$5,000. This compensation was for labor only; Siry remained responsible for paying for materials and other related costs. Rubin found several other framers to work on the project, who were then approved by Siry. Rubin and the other men began the work in late June 2006.

During the next six months, Rubin worked on the project, which consisted primarily of supervising framing work on the three new buildings (house, barn and

cabana). Rubin also helped Siry by answering questions from workers and others at the site. During the first three months of this work, Rubin paid the other framers their weekly wages. Rubin then asked Siry if he would pay the workers directly. Siry agreed, and paid the framing workers each week based on a list of payment amounts given to him by Rubin.

In late November 2006, Siry terminated Rubin after the parties had a disagreement about a chimney. Rubin and the framing workers immediately left the project. At that point, the framing work was substantially ("98 percent") complete. Siry had paid \$46,686.49 to Rubin and \$27,233 to the other framing workers. Rubin filed an administrative claim seeking payment of unpaid wages for his carpentry work.

Complaint and Cross-Complaint

Siry then sued Rubin, asserting breach of contract, negligence, fraud, and claims based on contractor licensing laws. In the contract claim, Siry alleged Rubin breached the oral agreement by performing framing work that was substandard and not in conformance with applicable codes. In the negligence cause of action, Siry alleged that Rubin failed to use reasonable care in the construction work. In the fraud claim, Siry alleged that Rubin falsely represented he was an experienced and licensed contractor, and had sufficient personnel to complete the work in a timely and workmanlike manner. In the remaining two causes of action, Siry sought to recover all the amounts paid to Rubin

plus statutory penalties, based on the fact that Rubin was an unlicensed contractor and that Rubin worked under an oral contract.² (See §§ 7031, 7159.)

Acting in pro. per., Rubin filed a cross-complaint, as an individual and doing business as "AHAA Enterprises." Rubin asserted two causes of action: breach of an oral contract and fraud. Rubin alleged that Siry retained him to perform "framing construction" on Siry's home, but Rubin also alleged that he was hired as "an employee." Rubin claimed Siry breached this contract and committed fraud by falsely stating "he would hire [Rubin] as his employee to perform framing work and that he would pay him for these services."

Siry then filed a demurrer, contending the cross-complaint showed Rubin "was an independent contractor who cannot recover in the absence of a valid contractor's license." Rubin did not file a written opposition, or appear at the hearing.³ After taking the matter under submission, the court granted the demurrer without leave to amend on the cross-complaint, stating Rubin sought compensation for breach of an oral agreement requiring Siry to "'pay [Rubin] to perform framing services,'" and "a valid contractor's license is a prerequisite to maintaining a viable breach of contract and/or fraud cause of action premised" on this agreement. (See § 7031, subd. (a).)

² These causes of action were entitled: "Monies Had and Received" and "Violation of Business and Professions Code Section 7159."

³ An attorney appeared at the hearing on behalf of Rubin but the attorney said he had not been retained by Rubin. The court ruled the attorney could not represent Rubin under these circumstances and thus it considered the demurrer unopposed. But the court allowed the attorney to make "amicus" type arguments.

Trial

After the parties waived a jury, the court conducted a bench trial on Siry's claims against Rubin. Siry was represented by counsel, and Rubin appeared in pro. per.

At trial, Siry claimed he did not know Rubin was unlicensed when he hired him to work on the remodel project. Siry said he had been close friends with Rubin for about six to eight years, and therefore he trusted Rubin and never asked him whether he was licensed. Siry also said that before entering into the oral contract with Rubin, he had received at least one bid from a licensed framing contractor, and the bid was higher than the amount he agreed to pay to Rubin.

Siry testified the oral contract was "mainly" for Rubin to perform framing work, but once Rubin began working at the site "he was directing other people also So if an electrician had a question, they asked Larry. If the fire company had a question, they asked him. Everybody asked him questions. He was the one running the whole job, doing the framing, completing the whole project." Siry claimed he was "never" at the site during the construction work. Siry admitted, however, that he was responsible for selecting and ordering all framing materials, including the lumber, and paid for these materials.

With respect to the negligence and breach of contract claims, Siry argued that Rubin negligently performed framing work related to the window openings and the eaves. In support, Siry presented an expert, James Hadley, an experienced general contractor, who opined that the framing work fell below the standard of care applicable to a licensed framing contractor. Hadley said that 17 windows were not properly framed

because they were not recessed as required by the architectural plans. Siry produced evidence showing he paid \$10,650 to repair the windows and \$2,400 to repair the eaves, and he also sought damages for the delay caused by these alleged defects.

Rubin's primary defense theory was that Siry retained him to act only as Siry's employee, and not as a licensed contractor. Although Rubin (who appeared in pro. per.) did not give his own direct testimony, he testified in Siry's case-in-chief as an adverse witness and Siry submitted portions of Rubin's deposition testimony.⁴

In this testimony, Rubin said he had initially sought to work as a construction supervisor on one of Siry's downtown hotel projects, but Siry instead asked Rubin to work as a superintendent on his home remodel. Rubin described his job as "mak[ing] sure people got to work on time and did their job." But Rubin also acknowledged he was given a copy of the architectural plans and was responsible for ensuring the framing work met the requirements of the plans. Rubin said he would "guide the people" who performed the framing work, and admitted that on occasion he performed "layout work, . . . nailed up boards, . . . installed structural items in the framing," and "drill[ed] holes in the eave blocking." Rubin also said he was responsible for arranging for building inspectors to evaluate the framing work, and made changes to the framing work based on an inspector's comments. For example, Rubin stated that based on an

⁴ During closing arguments, the court asked Rubin questions pertaining to his work on the remodel project, and Rubin made numerous factual assertions that were not supported by facts presented during the evidentiary phase. After the argument, Siry's counsel objected to these statements. Because these assertions are not evidence upon which the court could properly rely, we do not discuss these assertions in this opinion.

inspector's comments about the drilled holes in the eaves blocking, "I ceased that practice and corrected it by putting in a piece of drywall directly after that." Rubin said he brought many of his own tools to the job, including a compressor, nail gun, screw gun, ladders, power cords, and carpentry hand tools. With respect to the other framing workers, Rubin said he brought some of those workers to the project, but denied that he made the final hiring decisions: "Mr. Siry [was] the final on the selection because he was the one who paid us."

Rubin also called Luis Gonzales as a defense witness, who is a licensed plastering contractor. Gonzales testified that Rubin contacted him about a plastering job on Siry's remodel project, and asked him to prepare an estimate for the project. After Gonzales gave Rubin the proposal, Rubin told Gonzales he was "going to give it to the contractor . . ." and about one month later, Rubin told Gonzales that "the contractor got someone else"

After considering the evidence and arguments, and taking the matter under submission, the court found in Rubin's favor on all of Siry's claims. In its written ruling, the court initially stated it found Siry knew Rubin was unlicensed when Siry hired him: "The Court finds the testimony of Siry [on this issue] to be unreliable and untrustworthy Siry and Rubin had been social friends for many years. Since about 2000, they along with other friends in the construction business met regularly for drinks It is inconceivable that Siry would not have known such basic information about a man he described as a long time good friend with whom he regularly socialized. The Court does not believe an individual with [Siry's] sophistication would not have

learned and known that his friend Rubin was not a licensed contractor but a construction superintendent. . . ."

The court additionally made a factual finding that Siry did not hire Rubin "in the capacity of a contractor for the Siry residence" and instead "Siry was an owner-builder on the project" who "employed Rubin as Siry's construction supervisor or superintendent to oversee the job." The court noted that the finding was "corroborated by" Gonzales's testimony that Rubin had referred to another individual as the contractor on the job. With respect to Siry's negligence cause of action, the court stated Handley's opinion testimony was insufficient to support this claim because Handley's opinion was "directed toward the standard of care of contractors"

DISCUSSION

Siry challenges the sufficiency of the evidence to support the court's factual findings that he did not prove his claims.

I. Review Standard

"[W]here a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination.

[Citation.] [¶] The appellate court reviews the evidence in the light most favorable to the respondents [citation], resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings

[citation]." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

We may not "weigh any conflicts or disputes in the evidence, or . . . assess the credibility of the witnesses Even where two or more different inferences can reasonably be drawn from the evidence, this court is without power to substitute its own inferences for those of the trial court and decide the case accordingly. In the absence of a rule of law specifying the inference to be drawn, it is for the trier of fact to resolve such conflicting inferences. We must therefore consider all of the evidence in the light most favorable to the . . . prevailing party, giving it the benefit of every reasonable inference from the evidence tending to establish the correctness of the trial court's decision, and resolving conflicts in support of the judgment." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1121-1122.)

II. *Fraud*

In his fraud cause of action, Siry claimed Rubin misrepresented that he was a licensed framing contractor. The court specifically found that Rubin did not make these representations, and that Siry fully understood that Rubin was not licensed and the nature of Rubin's prior experience. These findings were amply supported by the evidence. The evidence showed the parties had a close friendship and that Siry was a sophisticated business person with substantial contracting experience. Additionally, the evidence showed that the other bid from a licensed contractor was substantially higher than Rubin's bid. Based on this evidence, the court could reasonably conclude that Siry knew Rubin was not licensed and fully understood the nature and level of Rubin's prior work

experience. Thus, the court did not err in finding in Rubin's favor on the fraud cause of action.

III. *Recoupment of Payments Under Section 7031*

In his statutory recoupment claim, Siry alleged Rubin violated contractor licensing laws by performing framing work without a license. (See § 7026.) The court concluded Siry failed to prove this claim based on its factual finding that Rubin did not act as a contractor on the project, and instead was "employed" as a "construction supervisor or superintendent." On appeal, Siry contends this factual finding was unsupported by the evidence.

A. *Applicable Legal Principles*

Section 7031, subdivision (b) permits "a person who utilizes the services of an unlicensed contractor [to] bring an action . . . to recover all compensation paid to the unlicensed contractor for performance of any act or contract." The rule applies even if the property owner had *actual knowledge* at the time the contract was formed that the contractor was unlicensed. (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519-520.) This rule also precludes a contractor from asserting a defense of offset for work performed or materials received arising out of the unlicensed work. (*Id.* at pp. 520-522.) In this case, the primary issue is whether Rubin was a framing contractor and thus subject to section 7031's mandatory recoupment provision.

For purposes of the licensing law, a contractor "is synonymous with 'builder'. . . . [A] contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or

through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building [or part of a building]" (§ 7026.) Additionally, "contractor" includes subcontractor and specialty contractor. . . ." (*Ibid.*) Section 7026.1, subdivision (b) supplements these definitions by identifying various functions encompassed within the contractor definition, including "Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building or home improvement project, or part thereof."

Under these definitions, a party who builds or improves any portion of a structure, "himself or herself *or by or through others*," is a contractor, including a person who acts as a consultant to an owner/builder in the construction project. (§ 7026, italics added; § 7026.1.) Thus, a person is a contractor even if he or she merely supervises other individuals working on a particular construction job. (See *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 164-165.) "[B]oth the person who provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' . . . Indeed, if this were not the rule, the requirement that general contractors be licensed would be completely superfluous." (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 941.)

On the other hand, a person who acts solely as an owner's construction *manager*, is not a "contractor." (See *The Fifth Day, LLC v. Bolotin* (2009) 172 Cal.App.4th 939 (*Fifth Day*).) In *Fifth Day*, the property owner retained a construction management company "to assist . . . in coordinating the activities of the various workers to enable them to

complete their assigned tasks in an organized and efficient manner, on time and on budget," and to act as the owner's agent maintaining records and keeping the owner apprised of the status of the project. (*Id.* at p. 948.) The court found these activities did not constitute contractor functions, reasoning there was no evidence the company had "responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract" (*Ibid.*) The court emphasized that the management company did not contract with the owner to perform any of the activities listed in section 7026's contractor definition and that another licensed entity had been hired to perform and/or supervise all construction on the project. (*Ibid.*)

B. Analysis

We agree with Siry that Rubin's work consisted of building-type activities that fall within the definition of a contractor, rather than construction management services at issue in *Fifth Day*. Rubin acknowledged he was responsible for ensuring the framing work was consistent with the architectural plans. Although it appears Rubin may have "managed" other aspects of the remodel project, the undisputed evidence shows that with respect to the framing work, Rubin engaged in the building-type activities listed in section 7026's contractor definition, and/or supervised these activities.

This conclusion, however, does not end our analysis. A person who performs contractor-type work is not required to be licensed if he or she is performing that work *as the employee of an owner/builder*. (§ 7053; *Pickens v. American Mortgage Exchange* (1969) 269 Cal.App.2d 299, 305; see *Dorsk v. Spivack* (1951) 107 Cal.App.2d 206, 208 (*Dorsk*); see 1 Cal. Construction, Contracts, Defects, and Litigation (Cont.Ed.Bar 2009)

§ 1.3A, p. 9.) Section 7053 states the licensing requirement "does not apply to any person who engages in the activities herein regulated as an employee who receives wages as his or her sole compensation, does not customarily engage in an independently established business, and does not have the right to control or discretion as to the manner of performance so as to determine the final results of the work performed." Consistent with this rule, an owner who performs construction work on his or her own property is not required to be licensed and may perform the work "through his or her own employees with wages as their sole compensation," provided the structure is not intended for sale. (§ 7044, subd. (a).) The term "'[w]ages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece . . . or other method of calculation." (Lab. Code, § 200, subd. (a).)

In determining whether a person acted as the property owner's employee under these code sections, the critical factor is the owner's right to control the work. The determination of the worker's status "'is governed primarily by the right of control which rests in the employer, rather than by his actual exercise of control; and where no express agreement is shown as to the right of the claimed employer to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown'" (*Dahl-Beck Electric Co. v. Rogge* (1969) 275 Cal.App.2d 893, 900-901 (*Dahl-Beck*); accord *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983-984; *Vaughn v. DeKreek* (1969) 2 Cal.App.3d 671, 677; *Dorsk, supra*, 107 Cal.App.2d at p. 208.)

The extent to which an owner has the right to control the work presents a factual question. (*Dahl-Beck*, *supra*, 275 Cal.App.2d at p. 900; see *Vaughn v. DeKreek*, *supra*, 2 Cal.App.3d at p. 677; *Pickens v. American Mortgage Exchange*, *supra*, 269 Cal.App.2d at p. 305; *Dorsk*, *supra*, 107 Cal.App.2d at p. 208; see also *Wilson v. County of San Diego*, *supra*, 91 Cal.App.4th at p. 983.) The courts have recognized the determination of a worker's status is highly dependent on an analysis of the particular circumstances of each case, and an evaluation of numerous factors pertaining to the parties' relationship and the work performed. (*Dahl-Beck*, *supra*, at pp. 900-902; *Dorsk*, *supra*, at pp. 208-209; see also *Vaughn*, *supra*, at pp. 676-679.) A factual finding that a person is an employee for purposes of the licensing laws must be accepted by the appellate court unless the inference is wholly unsupported or is otherwise legally improper.

Applying these principles, we conclude there is evidence from which the trial court could have concluded Siry maintained the right to control Rubin's work.⁵ Siry was a sophisticated business person who had worked as a general contractor for almost 20 years, and during this time, he employed workers on numerous construction jobs. When Siry hired Rubin, the two had been close friends for about six to eight years, and the evidence supports the court's finding that Siry knew Rubin was not a licensed framer and fully understood the extent of Rubin's prior experience. It is additionally significant that the remodel project involved Siry's own home, lending support to an inference that Siry

⁵ Although the court did not specifically address the control issue in its written ruling, we are required to affirm a judgment if the evidence supports the judgment on any available theory that is consistent with the court's express findings.

intended to, and did, use his extensive contractor experience to maintain control over the remodel project to ensure the work satisfied his objectives. This inference is supported by the manner in which Siry controlled various aspects of the work. Siry approved the workers who Rubin brought to the site, and paid these workers more than \$25,000. Although Siry claimed these payments were merely for the workers' convenience, the court had a reasonable basis to reject this testimony. Further, Siry selected, ordered and paid for all of the framing materials. By doing so, it is reasonable to infer Siry intended to control the manner in which the framing work was completed. Additionally, Siry testified that his terminating Rubin was triggered when he was on the property and the two engaged in a dispute about the chimney, reflecting Siry's close involvement with the details of the project.

On this record, the court could find that Siry had the right to control Rubin's work and retained him as an employee, rather than an independent contractor. In reaching this conclusion, we are aware there is evidence supporting a different conclusion. For example, the evidence showed Rubin frequently acted without day-to-day supervision, and brought his own tools to the job site, and that Siry paid Rubin a fixed price, rather than by the hour. However, none of these facts renders a conclusion that Rubin acted as an employee legally improper. (See *Dorsk, supra*, 107 Cal.App.2d at p. 208-209 [court found construction supervisor acted as an employee although he was paid a fixed price for the job].) The critical factor is that Rubin received wages for his framing work (payment for his labor) (Lab. Code, § 200), and there was evidence showing Siry had the right to control the manner in which the work was performed.

The fact that there was evidence supporting a contrary conclusion does not render the court's conclusion erroneous. (See *Dorsk, supra*, 107 Cal.App.2d at pp. 208-209.) ""When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."" (*Estate of Teel* (1944) 25 Cal.2d 520, 526.) If "'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "[E]ven if the judgment of the trial court is against the weight of the evidence, we are bound to uphold it" if there is supporting evidence that is ""reasonable in nature, credible, and of solid value. . . ."" (*Ibid.*)

On our review of the record, substantial evidence supported the court's finding that Rubin was an employee on the remodel project, and therefore he was not required to be licensed.

C. Judicial Admission Doctrine

Siry alternatively contends Rubin is barred from arguing he was not a contractor because he alleged in his cross-complaint he was hired to perform "framing services."

Siry relies on the judicial admission doctrine. Under this doctrine, an ""admission in a pleading . . . is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues"" (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 218.) However, to constitute a binding judicial admission, the allegation must be clear and unequivocal. (*Richey v. Pedersen* (1950) 100 Cal.App.2d 512, 519.) Statements that are in any degree

ambiguous cannot constitute judicial admissions. (See *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066; *Irwin v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 709, 714.)

Viewing Rubin's allegations in context, Rubin did not unequivocally admit he acted as an independent contractor, rather than an employee. Rubin alleged that Siry represented "that he would hire" him "as *his employee* to perform framing work and that he would pay him for these services." (Italics added.) This allegation that Rubin was hired as an employee is inconsistent with a claim that Rubin was retained as an independent contractor. Siry argues that Rubin's allegations cannot be read as asserting an employee status because Rubin additionally brought the cross-complaint as a "dba AHAA Enterprises." However, Rubin filed the cross-complaint as a pro. per. Thus, the court could have reasonably found Rubin identified his "dba" in his pleading based on a belief that he was legally required to do so, rather than intending to concede a contractor status on the project. Viewing the allegations pertaining to the framing work in the context of the pleading as a whole and the circumstances of the case, they do not constitute a binding judicial admission that Rubin acted as an independent contractor.

Siry contends the judicial admission doctrine applies because the court sustained the demurrer based on its conclusion that Rubin was seeking to recover for work performed as an unlicensed contractor. However, in determining the applicability of the judicial admission doctrine, the focus is on the allegation and the party's intent in asserting the allegations, and not on the court's prior interpretation of those allegations. Whether a statement constitutes a judicial admission depends on whether the party

making the statement intended it as an admission or the opponent could reasonably have construed it as such. (See *Hoagland v. Chargin* (1955) 134 Cal.App.2d 466, 474.)

In this regard, we note that there is no basis for applying the collateral estoppel doctrine in this case. The facts show the independent contractor issue was never litigated in the demurrer proceeding. Rubin did not appear at the hearing on the demurrer, and although the court allowed an attorney associated with Rubin to argue at the hearing, the court made clear that it considered the demurrer unopposed because Rubin had not retained the attorney. Whether the court properly granted the demurrer is not before us.

IV. Negligence and Breach of Contract Claims

Siry contends the court erred in finding in Rubin's favor on the negligence claim. In support, Siry argues that he submitted unopposed expert testimony that the windows were not properly framed.

The court found the expert testimony did not support this claim because the testimony was premised on the assumption that Rubin was acting in the capacity of a licensed contractor. Because the evidence supports that Rubin was not acting as a licensed contractor, the court's conclusion was proper. Additionally, there is evidence in the record supporting that the window defect was the fault of the window supplier, and not the framer.

Siry does not assert any specific contentions regarding the remaining breach of contract claim. He thus waived his right to challenge the court's findings on this claim. (See *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1443.) In any event,

based on the court's finding that Rubin was an employee, there was substantial evidence to support the court's finding that Siry did not prove the contract claim.

DISPOSITION

Judgment affirmed. Appellant to bear respondent's costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.